

M e m o r a n d u m**585.0350**

To: San Mateo Audit (D.S.)

January 29, 1988

From: Headquarters – Legal (RLD)

Subject: G--- M--- S---

SR -- XX-XXXXXX

This is in reply to your August 11, 1987 memorandum regarding the application of use tax to the purchase and purported lease of a vessel by G--- M--- S--- (taxpayer), a partnership owned by Mr. M--- K. and Mrs. D--- L. G---.

We understand that the taxpayer obtained a seller's permit on June 22, 1984. The form BT-400, Application For Seller's Permit and Registration As A Retailer, shows the nature of business to be "sailing cruises". On August 21, 1984, the taxpayer purchased a 35-foot sailboat and issued a resale certificate to the seller. The taxpayer made no use of the vessel between August 21, 1984 until October 31, 1984. You note that, on October 21, 1984, the taxpayer "leased" the vessel and timely elected to report and pay use tax on lease receipts. You also note that, in all cases, where the taxpayer charts the vessel, the taxpayer skippers the vessel. The taxpayer bills a lump sum for the charter.

Given this information, you asked the following:

"1) When the owner 'skippers' the vessel, does it qualify as a bonafied (sic) lease or is the rental a hire of a transportation service, since control of the vessel is exercised by owner (Reg. 1660(a))?"

Assuming that the owner requires, as a condition to his providing the vessel, that he skipper the vessel, we believe that the vessel owner is providing transportation services to the customers. The chief characteristic of a renting or leasing is the giving up of possession to the hirer, so the hirer and not the owner uses and controls the rented property (Entremont v. Whitsell, 13 Cal.2d 290, citing Civ. Code §§ 1925, 1955). When possession, custody, and license to use equipment remains totally in the hands of the owner or his employees, such a transaction is not a lease for sales and use tax purposes. (BTLG Annot. 330.2660.)

You also posed various hypothetical situations concerning similar situations. As we discussed, the legal staff is reviewing the application of sales tax to situations posed by the hypothetical questions you raised; therefore, we are not providing answers to your questions at this time. However, if you have further questions as to this case or other actual cases as to which you need answers, feel free to write again.

RLD:sr